

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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**NOV 18 1998**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations	)	RM-9027
Anniston and Ashland, AL, College Park,	)	RM-9268
Covington, Social Circle, and Milledgeville,	)	RM -9384
Georgia	)	

To: Chief, Allocations Branch

**REPLY COMMENTS**

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## TABLE OF CONTENTS

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Summary .....	ii
Introduction .....	1
A. Social Circle Is Preferred Because College Park Is Not Independent .....	1
B. Even If College Park Is Independent, Social Circle Prevails .....	7
C. WNNX's September 15, 1998 <i>Reply Comments</i> Impermissibly Relies Upon New Facts .....	10
Attachments	
Certificate of Service	

## SUMMARY

Mr. Small proposes a first local service to Social Circle, GA while WNNX proposes a 44<sup>th</sup> service to the Atlanta Urbanized Area. Therefore, Mr. Small's proposal prevails. WNNX attempts to show that its College Park proposal is different in kind from the earlier rejected Sandy Springs proposal which also sought relocation of the Anniston, AL station to the Atlanta Urbanized Area. However, the difference is not of kind, nor even of degree, the only difference is one of direction where Sandy Springs is north of Atlanta and College Park is south of Atlanta. While WNNX demonstrates that College Park is an identifiable community for allocation purposes, such as by possessing a local government a phone book, and a zip code, WNNX has not overcome the overwhelming showing that College Park is interdependent with the Atlanta Urbanized Area which surrounds it and which provides College Park's *raison d'être*. WNNX attempts to minimize the evidence by claiming that various factors which show interdependence are inconsequential and not entitled to significant weight, despite the fact that it was WNNX which first trumpeted the significance of facts such as commuting patterns and the huge Atlanta-Hartsfield International Airport.

Even if College Park is independent, Social Circle still prevails. Under this scenario, both communities receive equal credit for proposing first local service. However, because WNNX's proposal seeks to add a 44<sup>th</sup> signal to a heavily served area, Social Circle prevails. Moreover, WNNX proposes a service loss to over half a million people and a permanent degradation below five services, or a reduction in services to persons already receiving fewer than five services, to more than 44,000 people. Because the Social Circle would not result in any person losing its fifth service,

the people of the Milledgeville area will continue to be "well served" while a substantial number of people in the Anniston area would not be "well served."

Finally, the Commission should not give any weight to the documentary evidence, or the related comments, which WNNX presented in its September 15, 1998 *Reply Comments*. Those factual assertions should have been presented earlier in the proceeding to afford the public a full opportunity to comment upon them. Filing new information in a reply pleading amounts to sandbagging, is unfair, and should not be tolerated by the Commission.

## INTRODUCTION

Preston W. Small (Mr. Small), by his attorney, hereby submits reply comments as authorized by the November 3, 1998 *Public Notice*, Report No. 2304, which added Social Circle, GA, to the captioned rule making proceeding. In reply thereto, the following is respectfully submitted:

### **A. Social Circle Is Preferred Because College Park Is Not Independent**

1) Mr. Small's Social Circle proposal seeks to provide Social Circle with its first local service while WNNX License Investment Co.'s (WNNX) proposal seeks to add the forty-fourth aural broadcast service to the Atlanta Urbanized Area. Thus, Mr. Small's Social Circle proposal prevails under allotment priority 3 (first local service) over WNNX's proposal which is analyzed under allotment priority 4 (other public interest considerations).<sup>1</sup>

2) WNNX has devoted substantial effort attempting to demonstrate that College Park is not interdependent with the Atlanta Urbanized Area. WNNX has argued that "the opponents would have the Commission believe that past case law requires a community to be completely independent on every factor and thereby have no relationship to the central city of the Urbanized Area." WNNX

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<sup>1</sup> In an attempt to rebut Mr. Small's claim that WNNX's College Park proposal is merely a technical manipulation of the rules prohibited by the Commission to resubmit its earlier rejected Sandy Springs proposal, WNNX argues that Mr. Small "has no problem with his decision to change his proposal midstream . . . ." WNNX *Reply Comments*, filed September 15, 1998, at 5 n. 6. The simple fact is that the Commission does not put WNNX's attempt to relocate its station to an urbanized area on the same level as Mr. Small's attempt to move to a non-urbanized, rural area. The Commission has expressed deep concern with the type of move WNNX is attempting and it has repeatedly stated that such proposals will be closely scrutinized. Moreover, WNNX fails to comment upon the fact that "there is no prohibition against a petitioner submitting, as a counterproposal, a new proposal which is mutually exclusive with that originally submitted and proposed in a Notice of Proposed Rule Making." Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan, Santa Isabel and Vieques, Puerto Rico, and Christiansted and Fredericksted, Virgin Islands, 7 FCC Rcd 3324, 3327 ¶ 18 (Alloc. Br. 1992); Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, at 19 n. 25. WNNX's criticism of Mr. Small is misplaced.

*Reply Comments*, filed September 15, 1998 at 4 ¶ 4. Of course, no such claims were made, it just happened that WNNX does not prevail on any of the *Tuck* factors.<sup>2</sup>

3) WNNX claims that "opponents waste a large portion of their pleadings concentrating on factors that historically have not been decisionally significant, namely commuting patterns and the Airport." WNNX *Reply Comments*, filed September 15, 1998 at ¶ 4. WNNX's statement that commuting patterns are unimportant is incorrect. Earlier § 307(b) cases have highlighted the importance of commuting patterns in determining a community's interdependence.

One useful indicator of whether a community is insulated from or integrated into a metropolitan area is where that community's residents are employed. . . . It is true that Malden has its own individual identity, and that it has some civic, educational, and governmental organizations of its own. But the overall evidence shows that Malden is a mere cog in the much larger Boston Urbanized Area. One of Boston's inner suburbs, Malden, is located only eight miles from Boston. It is not only contained within the Boston Urbanized Area, it is completely surrounded by other municipalities that are also included in the Boston Urbanized Area. The bulk of social, employment, and economic factors link Malden to Boston. Commuting Patterns, the transportation system, utility services, the declining total population, and the increasing minority population all point to the dominant role Boston plays in Malden's destiny. When these factors are combined with Boston's population ratio advantage (Boston is over 10 ½ times as large as Malden), it is apparent that Malden is not entitled to a Section 307(b) preference.

*RKO General, Inc.* (Boston), 60 RR 2d 1215 ¶¶ 87, 93-4 (ALJ 1986), *vacated as moot upon settlement* 65 RR 2d 837 (Comm'n 1988). Another ALJ determined in *RKO General, Inc.* (New York), 3 FCC Rcd. 4243 ¶¶ 241-47, 312 (ALJ 1988) that

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<sup>2</sup> Indeed, it is WNNX which seeks to apply the *Tuck* factors mechanically when it claims that it must prevail on "a majority of the factors." WNNX's *Petition for Rule Making*, filed November 6, 1997, at 9 ¶ 17. The Commission has determined that

When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary, to support a Huntington exception. On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city. . . . [T]he evidence necessary to demonstrate such relationship will vary depending on the circumstances in a particular case.

*Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374, 5378 ¶ 34-5 (Comm'n 1988).

The region's employment and transportation are focused largely on the central business district in New York City's Manhattan borough. Commuting patterns highlight Scarsdale's and Yonkers' dependence on New York City. Of Westchester County's workers, over 27% commute to work in New York City. Scarsdale is a classic "bedroom community."

4) Moreover, even WNNX, at least initially, considered that commuting patterns were very important. See WNNX's *Petition for Rule Making*, filed November 6, 1997, at 9 ¶ 18.1 where WNNX incorrectly claimed that "College Park is fully self-sufficient in providing work for its residents . . .;" see also WNNX's August 31, 1998 *Comments*, at 2-3 ¶ 2 where WNNX claims that College Park has "several major employers" and that "College Park is a thriving, significant, and self-sustaining city which does not depend upon Atlanta in any sense for its existence." U.S. Census figures show that fully 84% of College Park residents work outside of College Park, that 83% work outside of College Park but in the Atlanta MSA, that 38% work in the Atlanta Central City and that Atlanta is nearly 20 times larger than College Park. Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, at 8 ¶ 20. Simply stated, College Park is a classic bedroom community located in, and surrounded by, an urbanized area.<sup>3</sup>

5) Regarding WNNX's claim that its opponents "wasted" their time discussing the airport, *Reply Comments*, at 6 ¶ 8, it is WNNX which initially attached great importance to the fact that "College Park Is A Major Transportation Hub" which is "home to the Hartsfield [Atlanta] Airport" and that the Airport is one of College Park's "major employers" and "a major source of revenue to College Park." WNNX's *Petition for Rule Making*, filed November 6, 1997, at 9, 14 ¶¶ 18.1, 18.10.

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<sup>3</sup> WNNX attempts to discredit the U.S. Census data by asserting that it is "now more than eight years old" and that, generally, the U.S. Census contains errors. WNNX *Reply Comments*, filed September 15, 1998 at 7, 13 ¶¶ 11, 13. WNNX provides no support for its proposition that its submission of anecdotal information can supplant the data in the U.S. Census, the official population and statistical guide published by the United States government.

WNNX even claimed that a large network of hotels and motels has developed within College Park to service the Airport. *Id.* The reason WNNX now wishes to distance itself from these statements is that it has been demonstrated that the City of Atlanta owns the Airport. Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, ¶ 20.

6) Clearly, at the beginning of the rule making proceeding, it was WNNX which touted commuting patterns and the Airport as being key determining factors regarding College Park's interdependence with the Atlanta Urbanized Area. It was only after being presented with contrary evidence showing beyond a reasonable doubt that commuting patterns and the City of Atlanta's ownership of the Airport establish College Park's dependence upon the Atlanta Urbanized Area that WNNX now back pedals to a position from where it now claims that those facts are unimportant. WNNX had it right initially, area commuting patterns and the very large, region-dominating Airport, are very important to the issue of interdependence and they clearly show that College Park is interdependent with, and not independent of, the Atlanta Urbanized Area.<sup>4</sup>

7) WNNX attempts to bolster its argument that commuting patterns are unimportant by relying upon cases in which commuting patterns were not considered. *WNNX Reply Comments*, at 9 ¶ 15. Of course, the fact an issue was not raised in a case, or several cases, merely means that the parties did not think the issue was relevant under the circumstances, it does not mean that the Commission would consider the issue insignificant if brought to its attention. Moreover, none of the cases appears to discuss U.S. Census information relating to commuting patterns, which information

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<sup>4</sup> Indeed, WNNX cannot help itself from relying upon the Airport to support its case. Its September 15, 1998 *Reply Comments*, at 17 ¶ 32 asserts that the fact that a Federal Aviation Administration office is located in College Park is an indication of independence. It seems more than reasonable to conclude that the only reason the FAA is in College Park is because Atlanta's major Airport is in College Park.



has been presented to the Commission in the instant case. Accordingly, WNNX's effort to minimize its own initial claims concerning the importance of commuting patterns in assessing interdependence must be discounted as entirely self-serving.

8) Generally stated, WNNX's *Reply Comments* divides the *Tuck* factors into two camps. In the first camp are those factors which WNNX claims it need not prevail upon in order to establish independence and include commuting patterns, *Reply Comments*, at 6 ¶ 8; local media, *Reply Comments*, at 13 ¶ 22; perception of the community as independent, *Reply Comments*, at 14 ¶ 24; area advertizing, *Reply Comments*, at 22 ¶ 43. In the second camp are the factors which WNNX claims are most important in assessing interdependence including, local government and elected officials, the factor which WNNX asserts is the most important *Tuck* factor, *Reply Comments*, at 14 ¶ 28; local zip code and phone books, *Reply Comments*, at 16 ¶ 31; local commercial/health establishments and transportation systems, *Reply Comments*, at 14 ¶ 32; and municipal services, *Reply Comments*, at 23 ¶ 44.<sup>5</sup>

9) It is readily apparent that those factors in the first camp upon which WNNX would place little or no reliance are factors which tend to show economic and social integration with the surrounding Atlanta Urbanized Area. WNNX would prefer to emphasize the factors in the second camp which, by themselves, merely tend to establish that College Park is an identifiable community without necessarily being concerned with interactions with surrounding populations. The issue is not whether College Park is an identifiable community, although WNNX must certainly establish

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<sup>5</sup> In analyzing the *Tuck* factors, factors which WNNX divides into two camps containing four factors each, WNNX's conclusion that it need not prevail on the factors located in one camp, i.e., it need not prevail on four *Tuck* factors, contradicts WNNX's earlier statement that must prevail on "a majority of the factors." WNNX *Petition for Rule Making*, filed November 6, 1997, at 9 ¶ 17.

that fact in order to prevail on a § 307(b) issue, the issue is whether College Park, even if it is an identifiable community, is interdependent with the Atlanta Urbanized Area.

10) WNNX's principal reliance upon the fact that College Park has its own government is misplaced. Mr. Small agrees with WNNX that it would be impossible to demonstrate that a community located in an urbanized area which lacked a local government could not be considered independent. WNNX *Reply Comments*, at 15 ¶ 28. However, it does not follow that the Commission, therefore, considers this the most important issue in a *Tuck* analysis as WNNX claims. It merely establishes a minimum showing which must be made before there is a need to examine factors regarding area economic and social integration. The same thing can be said of zip codes and phone books, those items merely indicate, at best,<sup>6</sup> that an identifiable area exists as a community.

11) While it is not improper to argue that the existence of local businesses and transportation systems may tend to show some level of independence, the "major employers" presented in WNNX's earlier pleadings are interstate and/or multinational corporations, while College Park's major transportation systems are the Hartsfield-Atlanta International Airport and the regional Metropolitan Atlanta Rapid Transit Authority. Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, at 12, 13 ¶¶ 19, 21. Thus, College Park, whose entire population is insufficient to staff even the Airport, *Id.*, at ¶ 20, is entirely dependent upon the regional nature of its environment both for employment and for employees.

12) Moreover, after Mr. Small presented irrefutable evidence that the City of Atlanta provides the municipal services including water, sewer, and electricity to the Atlanta Airport located

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<sup>6</sup> Mr. Small has previously noted that unpopulated areas are able to obtain zip codes and that such evidence may not even tend to show "community." Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, at 18 n. 22.

in College Park, Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, at 11 ¶ 18, WNNX argued *Tuck* prohibits the consideration of city services provided to a huge land area filled at any one time with tens, perhaps hundreds of thousands, of people because those people are transient. WNNX *Reply Comments*, at 24 ¶ 47. *Tuck* contains no such prohibition. *Tuck* requires consideration "of the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries." *Tuck*, 3 FCC Rcd. at 5378 ¶ 36. There is nothing in *Tuck* which precludes the provision of municipal services to more than half of College Park's land area and it is difficult to imagine the Airport operating without electricity, water, and sewer services. While WNNX completely discounts municipal services provided to millions of travelers passing through College Park, travelers who use the very hotels, restaurants, convention center, and other businesses and services upon which WNNX relies so heavily. Neither *Tuck* nor common sense suggest such an approach where the goal is to determine the level of interdependence between and among "ostensibly separate communities." *Tuck*, 3 FCC Rcd. at 5378 ¶ 35.

#### **B. Even If College Park Is Independent, Social Circle Prevails**

13) If both petitions present allocation priority 3 cases, then the Commission must determine which community is more deserving of a first local service under allocation priority 4, other public interest considerations. Even if College Park were determined to be independent of the Atlanta Urbanized Area, Social Circle is still deserving of its first local aural service compared to a first local service for College Park. See Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, ¶ 30.

14) WNNX proposes to relocate Channel 263C from Anniston, AL to the Atlanta Urbanized Area as a downgraded Channel 263C3 will result in the loss of service to 658,920 people, see

WNNX's August 31, 1998 *Comments*, Technical Exhibit, Figure 3, while Mr. Small's proposed relocation of Channel 264A from Milledgeville to Social Circle as an upgraded Channel 264C3 will result in a loss of service to only 49,499.<sup>7</sup> Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, Attachment L, Engineering Exhibit, at 3. In an attempt to ameliorate its plan to remove Anniston's only commercial FM service from in excess of half a million people, WNNX proposes rule changes which require the allotment of two new channels to the Anniston, AL area. Accordingly, WNNX's plan is contingent upon the construction of not one, not two, but three radio stations, including its own relocation to Atlanta.

15) Even if all of these construction projects were completed as WNNX suggests, WNNX's proposal would still result in the permanent loss of second, third, fourth, and fifth services to 44,810 persons, including the loss of second service to 34 persons, the loss of third service to 5,302 persons, the loss of fourth service to 15,255 persons, and the loss of fifth service to 24,219 persons. See WNNX's August 31, 1998 *Comments*, Technical Exhibit, Figure 3. Thus, while Mr. Small's proposal will result in the loss of service to 49,499 persons, none of whom would lose a fifth service, Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, Attachment L, Engineering Exhibit, at 3, WNNX's proposal, even if fully implemented, would result in the loss of a critical second, third, fourth and

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<sup>7</sup> Mr. Small's Social Circle proposal would serve 186,022 people compared to Mr. Small's current service to 49,499; the Social Circle station would serve 3.75 times than the existing service. Mr. Small's *Comments and Counterproposal to Relocate Channel 264A to Social Circle and Upgrade it to 264C3*, filed August 31, 1998, Attachment L, Engineering Exhibit, at 3. WNNX currently provides service to 658,920 persons and would provide service to 2,350,034 persons if the Anniston station is relocated to the Atlanta Urbanized Area, an increase in service of 3.57 times over the service already provided. WNNX *Comments*, at 3 ¶ 3 and Technical Exhibit at Figure 3. Thus, on a relative basis, Mr. Small proposes a more substantial upgrade than does WNNX.

fifth services to nearly as many people.<sup>8</sup> The Commission considers that the provision of five services to area listeners is an extremely important consideration in evaluating the merits of a proposal to reallocate an existing service. *Quincy and Susanville, California*, 10 FCC Rcd. 7709, 7711 ¶ 12 (Alloc. Br. 1995) ("while we carefully evaluate any proposal that would result in the loss of existing reception service, the population within the loss area will continue to receive service from five or more fulltime aural services."). Significantly, an area must receive at least five aural signals in order to be considered "well served." "well served." *Dayton, Washington and Weston, Oregon*, 1998 FCC LEXIS 2828 ¶ 2 (DA 98-1088) (Alloc. Br. 1998). WNNX's proposal will cause people that already receive inadequate service to lose an existing service and WNNX's proposal will cause 24,219 persons who currently receive adequate service, to be reduced to inadequate service.

16) Mr. Small's proposal would not only result in the first local service for Social Circle, it would provide Walton County with its first FM service, its first full-time service, and only its second aural service.<sup>9</sup> WNNX's proposal, on the other hand, calls for the Atlanta Urbanized Area to receive its forty-fourth aural service. Mr. Small's September 15, 1998 *Reply Comments*, at 4 ¶ 7. WNNX's proposal to add the 44<sup>th</sup> aural service to the Atlanta Urbanized Area is inferior to the Social Circle proposal, especially where WNNX proposes service disruptions to 658,920 persons and significant service reductions, below five signals, to 44,810 persons and cause those persons to receive an inadequate level of services. The Commission has determined that "the replacement of an operating station with a vacant allotment does not adequately cure the disruption of existing

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<sup>8</sup> Even if WNNX's claim of reduction of interference to 11,675 persons is credited, WNNX *Comments*, at 3 ¶ 3, that would still leave 33,135 persons will permanently reduced service (44,810-11675); WNNX fails to explain whether any of these 11,675 persons would be receiving a substantial fifth or better service through elimination of the interference.

<sup>9</sup> Station WKUN-AM provides daytime service to Monroe, GA.

service to the public," *Bay City, et al., TX*, 8 FCC Rcd. 1552 1554 ¶ 8 (MMB 1993). This is especially true where WNNX's proposed reduction in service is to a large number of persons who will no longer be able to receive five aural signals and thus will no longer be considered to be "well served." *Dayton, Washington and Weston, Oregon*, 1998 FCC LEXIS 2828 ¶ 2 (DA 98-1088) (Alloc. Br. 1998).

**C. WNNX's September 15, 1998 *Reply Comments* Impermissibly Relies Upon New Facts**

17) Finally, in evaluating the merits of WNNX's Anniston-to-Atlanta proposal, the Commission should give no weight to the attachments, or any related discussion, included in WNNX's September 15, 1998 *Reply Comments*. First, while WNNX's *Reply Comments* do not appear to violate any page length rule, it is inappropriate for WNNX to introduce new factual material at the reply stage. WNNX's *Reply Comments* are as extensive as was its petition for rule making and WNNX used the reply comment opportunity to present information which should have been presented in its petition for rulemaking, or at least in its initial set of comments, in order to afford the public a fair opportunity to comment upon WNNX's factual presentation. "Such lackadaisical sandbagging is anathema to a fair and orderly hearing process." *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 789 ¶ 16 (Rev. Bd. 1986).

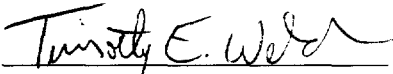
18) In order to respond to WNNX's newly presented evidence, the instant pleading would be transformed from a reply comment upon Mr. Small's counterproposal as it relates to WNNX's petition for rule making, to a rebuttal of WNNX's untimely information submitted to bolster WNNX's claim that College Park is independent. WNNX did not argue a single reason why it could not have presented the information contained in the attachments to its *Reply Comments* including

supporting letters,<sup>10</sup> information obtained from the Internet, information relating to local area publications, local businesses, civic organizations, health organizations, emergency services, churches, clubs, local access cable channel and various pictures in its earlier submissions or why it was appropriate to deny opposing parties a fair opportunity to comment upon WNNX's effort to use that information in an attempt to demonstrate that College Park is not impermissibly interdependent upon Atlanta. Exhibit 9 of WNNX's *Reply Comments* even contains undated "Supporting Comments" by "Marengo Broadcast Associates" apparently filed with the Commission but which were not served upon Mr. Small.<sup>11</sup> WNNX's reply is limited to commenting upon the comments filed by the other parties, the reply is not to serve as a vehicle for WNNX to present new factual allegations which should have been raised earlier in the proceeding.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that Mr. Small's Social Circle proposal is superior to WNNX's College Park proposal.

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<sup>10</sup> WNNX's last minute effort to have new information included in the record at the reply comment stage is highlighted by the "supporting" letters in Exhibit 5 each of which is dated September 14, 1998, the day before reply comments were due, and each of which exhibits the attributes of "cookie cutter" preparation.

<sup>11</sup> WNNX's *Reply Comments* do not indicate whether Marengo Broadcast Associates' "Supporting Comments" are filed for the first time in WNNX's *Reply Comments*. If Marengo's "Supporting Comments" were filed for the first time in WNNX's *Reply Comments*, not only are they untimely, a question would be raised as to whether WNNX abused the Commission's processes, misrepresented facts, and lacked candor by directing Marengo to label its undated comments "Supporting Comments," rather than "reply comments," in an attempt to make the comments appear to have been earlier filed. Exhibit 5 of WNNX's *Reply Comments* contains obviously late filed supporting comments while Exhibit 9 presents Marengo's "Supporting Comments" as a free standing document which bears the appearance of having been earlier filed with the Commission.

## CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of November 1998 served a copy of the foregoing  
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